Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

ELFEGO RODRIGUEZ, et al.,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

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(erroneously sued as an independent entity named
"BURBANK POLICE DEPARTMENT")

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

Court of Appeal
State of California
Second Appellate District

Trial Court Case Number BC 414602.

Case Name: *Rodriguez, et al. v. Burbank Police Department, et al.*

Defendant and Respondent City of Burbank has no parent corporations and there are no companies owning a 10% or more interest in it. Respondent knows of no entity or person that must be listed under Rule 8.208 subdivision (1) or (2).

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I. INTRODUCTION

This is an action under the California Fair Employment and Housing Act ("FEHA") for discrimination, retaliation and harassment, brought by five officers of the Burbank Police Department ("BPD") against Respondent City of Burbank ("Burbank"). This appeal is from summary judgment granted as to the claims of one of those five officers – Appellant Elfego Rodriguez ("Rodriguez").

In this Brief, Burbank will demonstrate to this Court that all of Rodriguez's claims fail as a matter of law. Rodriguez's claims for discrimination and retaliation (and his claims for failure to prevent discrimination and retaliation) fail because no actionable adverse employment action was ever taken against Rodriguez. Rodriguez's claims are based on three particular duty assignments as to which, although Rodriguez was actually given all three assignments, he was not given them at precisely the time he wanted. Failure to obtain a particular work assignment exactly when wanted is not an adverse employment action and is not actionable. Rodriguez's claims also fail because Burbank produced evidence of legitimate reasons for its decisions, and Rodriguez produced no evidence that Burbank's stated reasons for denying Rodriguez these assignments (at the times he wanted them) were pretextual.

Rodriguez's harassment claims fail because the "harassment" he alleges was nowhere near sufficiently severe and pervasive to support such claims. Further, virtually all of the alleged harassment occurred many years before Rodriguez filed any claim under the FEHA, and his claims are therefore time barred.

Burbank will also show that the Trial Court did not abuse its discretion by refusing to delay the hearing on Burbank's motion based on

Rodriguez's "intention" to amend his complaint, and that the Trial Court's evidentiary rulings were correct.

The undisputed facts supporting Burbank's motion were taken almost entirely from Rodriguez's own sworn deposition testimony. The only exceptions were matters which Rodriguez himself stated he could not testify about because he did not know (including Burbank's reasons for the challenged assignments), and a few specific dates and details of the assignments. Because Burbank's motion was based on Rodriguez's own sworn testimony, there can be no tenable contention that there was any triable dispute of fact. Rodriguez cannot create an issue of fact by contradicting his sworn deposition testimony. *Archdale v. American Internat. Specialty Lines Ins. Co.,* 154 Cal.App.4th 449, 473 (2007) ("Where a party's self-serving declarations contradict credible discovery admissions and purport to impeach that party's own prior sworn testimony, they should be disregarded").[1]

II. STANDARD OF REVIEW

Summary judgments are reviewed de novo. *Merrill v. Naveagr, Inc.,* 26 Cal.4th 465, 476 (2001). Summary judgment must be affirmed "if it is

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1 Rodriguez's Opening Brief violates C.R.C. 8.204(a)(1)(C), which requires that each appellate brief must "support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Here, Rodriguez cites only to his "separate statement" and not to the pages of the record containing the supporting evidence. "[A] separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion. In an appellate brief, an assertion of fact should be followed by a citation to the page(s) of the record containing the supporting evidence." *Jackson v. County of Los Angeles*, 60 Cal.App.4th 171, 178, n.4 (1997) (emphasis in original); *Stockinger v. Feather River Comm. College*, 111 Cal.App.4th 1014, 1024–25 (2003) (accord). The Court therefore should disregard Rodriguez's contentions unsupported by proper cites to the record.

correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court's stated reasons." *Angelotti v. The Walt Disney Company*, 192 Cal.App.4th 1394, 1402 (2011).

"The court's evidentiary rulings made on summary judgment are reviewed for abuse of discretion." *Walker v. Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1169 (2002). Denial of a motion for leave to amend a pleading is reviewed for abuse of discretion. *Melican v. Regents of University of California*, 151 Cal.App.4th 168, 175 (2007).

III. STATEMENT OF FACTS

Rodriguez began work for the BPD in 2004.[2] At the time the First Amended Complaint ("FAC") was filed, and at the time of the motion for summary judgment, he remained employed by the BPD.[3] He had never been disciplined.[4] He had never been denied a promotion.[5] During his tenure, Rodriguez sought four special assignments and got all of them: Field Training Officer, Special Enforcement Detail, Special Response Team, and U.S. Marshall's Task Force.[6] All of his performance evaluations were above satisfactory.[7] In fact, when asked at his deposition if he could think of any white officer who had a more successful track

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2 2-CT-252:24-253:1; 3-CT-631:7-10 (undisputed). For the Court's convenience, Burbank has noted when Rodriguez agreed in his opposition to Burbank's summary judgment motion that a fact or a portion of the fact was "undisputed."

3 1-CT-22:18-23, 1-CT-156:12-13.

4 2-CT-314:22-23.

5 1-CT-231:15-20.

6 1-CT-232:24-233:2, 1-CT-237:4-16, 1-CT-240:15-17, 2-CT-257:16-23, 2-CT-316:9-20.

7 2-CT-296:18-25; 3-CT-627:6-12 (undisputed).

record than himself in getting every assignment and duty that they had requested, Rodriguez was unable to think of one.[8]

In his deposition, Rodriguez identified three decisions about his employment with which he was in any way dissatisfied.[9] All three involved assignments which Rodriguez did not get; or rather, which he did not get at precisely the times he wanted them. First, although Rodriguez ***was*** assigned the Special Enforcement Detail ("SED"), he lost that assignment when the SED unit was disbanded.[10] Second, although Rodriguez ***was*** selected for the Special Response Team ("SRT Team"), he was not the first officer selected after he applied.[11] Finally, although Rodriguez ***was*** assigned to be a Field Training Officer for 21 months, there was one later occasion when he was not selected for a temporary one-week assignment to perform field training duties, filling in for another Field Training Officer who was on vacation.[12] The details of these three incidents are discussed below.

Rodriguez claims that these three incidents were based on discrimination for his ethnicity (Hispanic) and national origin

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8 2-CT-317:13-18; 3-CT-627:24-27 (undisputed).

9 1-CT-238:1-14. In his brief in opposition to the motion below, Rodriguez complained (for the first time) that when he returned to patrol after SED was disbanded, he did not immediately get his preferred shift, 3-CT-586:18-20, although his declaration concedes that he eventually did get that shift. 5-CT-1141:14-16. Rodriguez simply ignores the fact that he was then given a special assignment, at his own request, to the "prestigious" U.S. Marshall's Task Force. 2-CT-316:9-317:2.

10 1-CT-156:15, 1-CT-238:15-21, 1-CT-240:15-20, 1-CT-346:13-23; 3-CT-603:5-9 (undisputed); 3-CT-603:10-16 (undisputed).

11 2-CT-254:21-255:10, 2-CT-257:19-23; 3-CT-616:14-17 (undisputed); 3-CT- 618:22-26 (undisputed).

12 1-CT-44:19-45:1, 1-CT-159:25-160:2, 1-CT-166:7-12, 1-CT-233:13-234:5; 3-CT-623:21-24 (undisputed).

(Guatemalan).[13] He also claims that they were in retaliation for complaints he made about discrimination and harassment.[14] Specifically, Rodriguez was one of more than a dozen officers interviewed by an outside attorney/investigator, Irma Rodriguez Moisa, in Spring 2008.[15] Moisa was hired by the BPD to conduct an independent investigation after the Department received an anonymous letter complaining about racial and ethnic remarks made by unnamed BPD officers.[16] (Rodriguez denies knowing anything about who sent that letter.[17]) Rodriguez did not seek out Moisa to make any report or complaint; she contacted him, among many other officers, to interview.[18]

When he was interviewed, Rodriguez told Moisa that he had heard some derogatory comments made about Hispanics years before, when he was a probationary officer, but that since he had become a more experienced officer nobody would make a comment like that in his presence.[19] Rodriguez then reaffirmed, in his deposition testimony, what he had told Moisa – that all of the derogatory comments he could recall were made during the first year or so of his career:

> Most of these comments I heard were earlier in my career, right around that time, my first year on. I don't know specifically if some bridged that line after -- after the year mark. But shortly after that I left the Thursday, Friday,

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13 1-CT-22:18-23, 1-CT-44:19-47:4, 1-CT-49:5 *et seq.*

14 1-CT-22:18-23, 1-CT-44:19-47:4, 1-CT-55:23 *et seq.*

15 1-CT-159:12-19, 2-CT-270:1-10, 2-CT-297:20-298:7; 3-CT-629:6-9 (undisputed); 3-CT-629:10-13 (undisputed).

16 1-CT-159:12-15, 2-CT-268:16-20.

17 2-CT-269:3-5; 3-CT-628:20-23 (undisputed).

18 1-CT-159:17-19, 2-CT-297:20-298:7, 2-CT-299:24-300:11; 3-CT-629:6-9 (undisputed); 3-CT-629:14-21 (undisputed)

19 2-CT-274:6-18.

> Saturday day shift, and I didn't hear those comments after I left that.[20]

Particular remarks Rodriguez reported to Moisa included hearing Hispanics referred to as "paisas" (Spanish slang for countryman or "paisano"), referred to as "12500's" (reference to the Vehicle Code Section prohibiting driving without a licenses), referred to as "those people" or "your peeps," and referred to as "Mojados."[21]

Rodriguez identified only two specific individuals who made any of the foregoing remarks – Officers Aaron Kendrick and Jared Cutler.[22] Officer Kendrick was disciplined as a result of Moisa's investigation and a follow-up internal investigation.[23] Officer Cutler left the Department before any discipline could be considered.[24]

Rodriguez identified one particular remark, which he took as an ethnic reference, directed at him personally. That was during Rodriguez's first year to 18 months in the BPD (i.e., 2004-2005), when Sergeant Kelly Frank said to Rodriguez: "You look like the bad guys we chase."[25] Rodriguez never asked Frank what he had meant by this comment.[26] As set

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20 2-CT-280:5-16.

21 2-CT-275:5-277:12, 2-CT-277:18-278:5, 2-CT-278:6-9; 3-CT-630:23-27 (undisputed). Rodriguez initially testified that these were all the derogatory terms he could recall hearing about Hispanics. 2-CT-278:13-279:10. He later testified to hearing some other terms, including Hispanics referred to as "gardeners," "Julios," "half breed," and "wetback." 2-CT-305:4-306:2, 2-CT-307:14-309:4, 2-CT-310:3-311:9, 2-CT-312:21-313:21; 3-CT-633:24-634:3 (undisputed). Rodriguez also said he had heard some derogatory terms for Armenians. 3-CT-633:24-634:3.

22 2-CT-272:3-8, 2-CT-273:9-12, 2-CT-276:18-22, 2-CT-276:25-277:12, 2-CT-277:23-278:5, 2-CT-278:6-12, 2-CT-304:5-20.

23 1-CT-159:21-23, 2-CT-280:17-23.

24 1-CT-159:21-23, 2-CT-280:24-281:12.

25 2-CT-293:13-23.

26 2-CT-294:10-12; 3-CT-635:14-17 (undisputed).

forth in Frank's declaration, Frank was actually referring to Rodriguez's car, which was a mid-1960's Chevrolet and which Frank felt looked like the type of car the Burbank Police Department often sees driven by street racers.[27] Frank's comment had nothing to do with Rodriguez's ethnicity or national origin.[28]

Rodriguez identifies one other report of harassment which he made. In early 2009, Rodriguez and his co-plaintiff Karagiosian observed some quotations taken from what a witness had said during an interview.[29] The quotations were written on a dry erase board in the Detective Bureau.[30] Karagiosian (who is Armenian) told Lieutenant Armen Dermenjian (who is also Armenian) that he was offended by the comments, because he felt it made fun of the way Armenians spoke.[31] At that time, Rodriguez mentioned to Dermenjian that he also felt the comments on the board were "inappropriate."[32] Rodriguez does not recall saying anything else on the subject.[33] Rodriguez testified that he did not make any other report of the incident, because Karagiosian had already reported it.[34]

---

27 1-CT-167:8-13, 1-CT-167:17-20.

28 *Id.*

29 The quotations were:
"My friend...100 percent."
"I tell you everything...100 percent."
"Sir, please, I beg you."
"Swear to God not 100 percent but 1000 percent."
"Burbank police: Sir, what happened? Tell me. What do you know? Well what do you know?." 2-CT-291:16-292:15, 2-CT-319.

30 2-CT-263:11-21, 2-CT-264:18-265:6, 2-CT-287:13-20, 2-CT-319.

31 1-CT-22:11-17; 8-CT-1921:1-24.

32 2-CT-266:16-23, 2-CT-267:6-17.

33 2-CT-266:16-23, 2-CT-267:6-17. Rodriguez also discussed some of the comments he heard with his co-plaintiff Omar Rodriguez, but he ceased having any such conversations in early 2008. 2-CT-294:13-295:22, 2-CT-301:5-19; 3-CT-638:15-23 (undisputed). Rodriguez explained:

(...continued)

IV. ARGUMENT

A. The Principles Governing Summary Judgment On FEHA Discrimination And Retaliation Claims.

In this Section of this Brief we will discuss Rodriguez's claims under FEHA for discrimination (First Cause of Action in the FAC) and retaliation (Third Cause of Action in the FAC). We discuss these claims together because Rodriguez does not differentiate between his discrimination and retaliation claims. He simply identifies the three incidents where he did not get the assignment he wanted at the time he wanted, and attributes them to discriminatory and/or retaliatory motives.

The principles governing these claims are well-established. "[When a defendant seeks summary judgment as to a FEHA claim,] California follows the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether there are triable issues of fact for resolution by a jury." *Loggins v. Kaiser Permanente Int'l.*, 151 Cal.App.4th 1102, 1108-09 (2007). *See also Guz v. Bechtel Nat. Inc.*, 24

(...continued)

Q And at the point in time when you stopped having those conversations in early '08, is there a reason you stopped?

A No. I think my career had moved on and I had kind of gotten away from Officer Cutler and Officer Kendrick, and I was just kind of away on my own.

Q So you no longer felt any need to talk to Lieutenant Rodriguez about it; is that correct?

A Right. 2-CT-301:11-19.

Rodriguez discussed these matters with Omar Rodriguez not for the purpose of reporting them; he testified that he did not want them reported and he only told Omar Rodriguez because he trusted Omar Rodriguez not to repeat them to anyone else. 2-CT-302:5-11.

34 2-CT-267:6-17.

Cal.4th 317, 380 (2000) ("California courts apply the test that the United States Supreme Court articulated in *McDonnell Douglas Corp. v. Green*").

Under the *McDonnell Douglas* analysis, "(1) The complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive." *Mixon v. Fair Employment & Housing Com.*, 192 Cal.App.3d 1306, 1317 (1987). Whether the parties have met their respective burdens are questions of law for the trial court. *Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal.App.4th 189, 201 (1995).

B. Rodriguez Failed To Make A Prima Facie Case Of Discrimination Or Retaliation.

1. Rodriguez Suffered No Adverse Employment Action.

a) The Purported Adverse Employment Actions

In both discrimination and retaliation cases, an element of the prima facie case is that the employee suffered an "adverse employment action."[35] Rodriguez cites three purported adverse employment actions. Two of these are mentioned in his FAC – losing his assignment in the SED when that unit of the BPD was disbanded, 1-CT-46:13-23, and not being assigned to the SRT Team, 1-CT-45:18-24. During his deposition, Rodriguez testified as to one other decision about his employment which he found

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35 *Guz*, 24 Cal.4th at 355 ("plaintiff must provide evidence that ... he suffered an adverse employment action, such as termination, demotion, or denial of an available job"); *Mokler v. County of Orange*, 157 Cal.App.4th 121, 138 (2007) (To establish a prima facie case of retaliation "a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action... .").

objectionable – he was not given an assignment to fill in for a training officer while the training officer was out on vacation for one week.[36] Rodriguez testified that these were the only three decisions about his employment during his entire tenure with the BPD which with he was ever dissatisfied in any way.[37]

We will describe each of these purported adverse employment actions below, followed by a discussion of why Burbank was entitled to summary judgment on Rodriguez's claims as to each of these actions.[38]

i Disbanding the SED Unit

Rodriguez was selected for SED by Captain Janice Lowers in or around October 2008.[39] This was a unit that assisted BPD detectives.[40] Rodriguez remained in SED until that unit was disbanded in May 2009.[41] At the time the SED unit was disbanded it was staffed by a Sergeant and two police officers – Rodriguez and his co-plaintiff Karagiosian.[42] Two other positions in SED were vacant, and never filled.[43] The SED

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36 1-CT-233:13-234:5, 1-CT-238:1-14.

37 1-CT-238:1-14.

38 We should note that each of these actions represents a separate claim, subject to independent rulings on summary adjudication. *Lilienthal & Fowler v. Superior Court*, 12 Cal.App.4th 1848, 1854-1855 (1993) ("a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action"). If for any reason this Court should reverse some aspect of the summary judgment, Burbank is still entitled to summary adjudication as to those individual claims which the Court determines to lack merit.

39 1-CT-156:15, 1-CT-240:15-20; 3-CT-603:5-9 (undisputed).

40 1-CT 238:22-239:17.

41 1-CT-238:15-21, 1-CT-240:15-20; 3-CT-603:5-9 (undisputed).

42 8-CT-1915:24-1916:13.

43 8-CT-1915:24-1916:19.

assignment did not involve any change in rank or additional compensation.[44]

The decision to disband the SED unit was made based on the recommendation of the same Captain – Janice Lowers.[45] This recommendation was accepted by Chief of Police Tim Stehr, who agreed with Lowers that disbanding the unit was the best way to meet the BPD's needs.[46] The decision was based on several factors. First, the Department was facing budgetary constraints which left it understaffed.[47] These constraints had kept the Department from fully staffing SED, and left it with openings in its Patrol Division as well.[48] Captain Lowers believed, and Chief Stehr agreed, that it was more important to address the needs of the Patrol Division than to provide additional assistance to the detectives, because the Patrol officers are the front-line officers who respond to calls for assistance and provide police presence "on the street."[49] Further, because the SED unit could not be fully staffed (due to the budgetary constraints), Chief Stehr did not believe the unit could function effectively.[50]

Second, Chief Stehr did not believe that a unit that focused on assisting detectives was the best way to use BPD resources.[51] The SED unit was already in existence when Stehr assumed the position of Police Chief; he did not create the unit.[52] Chief Stehr envisioned, instead, a unit

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44 1-CT-159:25-160:2, 1-CT-168:10-22, 1-CT-230:4-15.
45 1-CT-156:17-22, 1-CT-160:7-10.
46 1-CT-160:7-161:19.
47 1-CT-156:17-22; 1-CT-160:12-20.
48 *Id.*
49 *Id.*
50 1-CT-160:12-20.
51 1-CT-160:22-161:3.
52 1-CT-160:22-161:3; 3-CT-608:15-19 (undisputed).

of uniformed officers (SED officers were plainclothes) within the Patrol Division, that would assist the Department with special problems in all areas.[53] Chief Stehr announced his intention to create such a Special Problems Unit at the time he disbanded SED, but the unit has never been created or staffed (again, due to budgetary constraints).[54] (In his Brief, Rodriguez asserts, without evidence, that this new unit would "function identical to SED."[55] This misrepresents the record, and ignores the fact that the new unit was never created.)

Third, the Chief was concerned about the supervision of the SED unit. In January 2009, Chief Stehr had removed the Sergeant over SED, Neil Gunn, due to concerns about the number of use of force incidents in which Gunn had been involved.[56] Captain Lowers had previously counseled Gunn that, as a supervisor, he should try to avoid becoming personally involved in use of force situations.[57] However, the Chief and the Captain concluded that Gunn was not following this instruction.[58] As a result, Gunn was replaced as Sergeant over SED by Sergeant Travis Irving.[59] However, Irving was also assigned to supervisory duties at the Burbank animal shelter and could not devote his full time to supervising SED.[60]

Chief Stehr was concerned about the fact that SED had been supervised by a Sergeant whose record on use of force might be subject to

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53 1-CT-160:22-161:3.
54 1-CT-160:22-161:3.
55 OB 10.
56 1-CT-161:5-19; 3-CT-611:20-25 (undisputed).
57 1-CT-156:24-27; 3-CT-611:26-612:4 (undisputed).
58 1-CT-156:24-27, 1-CT-161:10-19; 3-CT-612:5-9 (undisputed).
59 1-CT-161:5-8, 2-CT-241:5-8, 3-CT-612:10-13 (undisputed).
60 1-CT-161:5-8.

scrutiny.[61] At the time the Chief disbanded the SED unit, he had only recently learned of allegations that Lieutenant Omar Rodriguez (also a plaintiff in this action) had used unauthorized force in interrogating a witness, and had (along with other officers) intimidated another police officer into lying to cover-up this misconduct.[62] Allegations of unauthorized use of force had become the subject of investigations by the Los Angeles County Sheriff's Department and the FBI.[63] Given the circumstances, Chief Stehr was concerned that officers assigned to the SED unit could come under increased scrutiny based on the history of Sergeant Gunn.[64]

When SED was disbanded, Rodriguez was transferred back to a patrol assignment (along with Sergeant Irving and Officer Karagiosian).[65] By his own admission, Rodriguez cannot dispute that the SED unit was disbanded for the reasons described above. Rodriguez testified that he had "suspicions" that the unit was disbanded for the purpose of depriving him of the opportunity to work in it, but he acknowledges that this was pure speculation on his part.[66]

ii The SRT Team

The SRT Team (which is Burbank's version of a "SWAT" team) is a unit which responds to certain emergencies, such as hostage situations and

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61 1-CT-161:10-19.

62 1-CT-161:21-162:3; 3-CT-613:5-12 (undisputed).

63 1-CT-161:21-162:3; 3-CT-613:13-20 (undisputed).

64 1-CT-161:21-162:3.

65 2-CT-242:11-243:6, 2-CT-346:13-23, 2-CT-429:4-22, 2-CT-430:7-10; 3-CT-603:10-16 (undisputed).

66 2-CT-244:21-245:10, 1-CT-160:5-161:19, 2-CT-299:5-19, 2-CT-303:11-16, 2-CT-315:16-21.

serving high risk search or arrest warrants.[67] Rodriguez was, in fact, assigned to the SRT Team in February or March 2009.[68] He voluntarily left that assignment in late 2009 in order to accept an assignment on the U.S. Marshall's Task Force.[69] Thus, Rodriguez's complaint about his SRT assignment is not that he was denied the assignment, or forced out of it, but simply that he was not the ***first*** officer selected for the Team once he had applied. Three other officers were selected ahead of Rodriguez – Jeff Barcus, Adam Cornils and Steve Turner.[70]

Officers wishing to serve on the SRT Team must have at least two years of service on the BPD and must pass a shooting range test and a physical agility/obstacle course test.[71] The SRT Team trains one day a month.[72] According to Rodriguez, however, the Team is rarely called into service – Rodriguez testified that during the time he was on the SRT Team, he was never actually called out on an assignment.[73] During his tenure on the Team, Rodriguez is aware of only one occasion where the SRT Team was called out, but he missed that assignment because he was out of range to receive the call out on his cell phone.[74] Members of the SRT team receive no extra compensation for the assignment, and no change in rank.[75]

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67 1-CT-163:11-15; 3-CT-618:10-15 (undisputed).
68 2-CT-257:19-23; 3-CT-616:14-17 (undisputed).
69 2-CT-316:11-23; 3-CT-616:18-22 (undisputed).
70 2-CT-254:21-255:10; 3-CT-618:22-26 (undisputed).
71 1-CT-163:17-20, 2-CT-250:21-25, 2-CT-251:9-25; 3-CT-618:16-21 (undisputed).
72 2-CT-256:15-19.
73 1-CT-163:11-15, 2-CT-261:25-262:23; 3-CT-616:26-617:9 (undisputed).
74 1-CT-163:11-15, 2-CT-261:25-262:23; 3-CT-616:26-617:9 (undisputed).
75 1-CT-163:17-20; 3-CT-617:10-13 (undisputed).

The decision to select Officers Barcus, Cornils, and Turner for the SRT Team before Rodriguez was made by Captain Pat Lynch.[76] The decision was based on the qualifications of those three officers – in particular the fact that all three of those officers had past experience which gave them special training for SRT duties.[77] Cornils had previously worked for the Monrovia Police Department, and spent four years as a member of their SRT-type team and of a multi-jurisdictional SRT-type team serving Monrovia and adjacent jurisdictions.[78] Barcus had worked as a Deputy County Sheriff before joining the BPD, and in that position had been on the Sheriff Department's Emergency Response Team.[79] Turner was a former marine corps infantryman, fire team leader, qualified expert marksman, and trained in close quarters combat tactics.[80] Rodriguez had no such special training or experience.[81] The decision to select Officers Barcus, Cornils, and Turner for the SRT Team before Rodriguez was also based on the fact that Barcus, Cornils, and Turner performed better than Rodriguez on the shooting range test and/or the physical agility/obstacle course test.[82]

When Rodriguez was selected for the SRT Team, he was selected ahead of other applicants who were white.[83]

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76 1-CT 163:22-164:25; 3-CT-620:21-25 (undisputed).

77 1-CT-163:22-164:14, 1-CT-164:19-25, 2-CT-258:18-259:1, 2-CT-260:7-22.

78 1-CT-164:6-10, 2-CT-258:21-23; 3-CT-619:11-21 (undisputed).

79 1-CT-163:27-164:4, 2-CT-258:18-20; 3-CT-618:27-619:10 (undisputed).

80 1-CT-164:12-14, 2-CT-258:24-259:1; 3-CT-619:22-620:5 (undisputed).

81 1-CT-164:16-17.

82 1-CT-163:22-164:14, 1-CT-164:19-25, 2-CT-258:18-259:1, 2-CT-260:7-22, 2-CT-299:5-19.

83 1-CT-165:1-2; 3-CT-622:17-21 (undisputed).

iii The one-week training assignment

This assignment (not even mentioned in Rodriguez's FAC) was a one-week assignment filling in for a training officer who was on vacation during the period June 27 through July 4, 2009.[84] The officers assigned to fill in as training officers during this week were Officers Krueger and Edwards.[85] These officers were selected by the Watch Commander, Lieutenant Eric Rosoff, based on the fact that those officers were good officers who had been working continuously in Patrol for at least a year, and who had expressed an interest in becoming regular Field Training Officers; Rosoff wanted to assist them in their career development by giving them an opportunity to act as Field Training Officers.[86] Rodriguez, in contrast, had already served as a regular Field Training Officer from January 2007 until he was assigned to SED in October 2008.[87]

b) None Of The Actions Rodriguez Identifies Rises To The Level Of An Adverse Employment Action.

None of the purported adverse employment actions discussed above can support a claim for discrimination or retaliation. Not every employment decision is actionable. "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." *Akers v. County of San Diego*, 95 Cal.App.4th 1441, 1455 (2002). The test for what rises to the level of an "adverse employment action" was set forth

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84 1-CT-166:7-13, 1-CT-233:13-234:5.

85 1-CT-236:1-13; 3-CT-624:14-18 (undisputed).

86 1-CT-166:7-18.

87 1-CT-44:19-45:1, 1-CT-159:25-160:2; 3-CT-623:21-24 (undisputed).

by the California Supreme Court in *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1036 (2005): "[W]e conclude that the proper standard for defining an adverse employment action is the 'materiality' test, ***a standard that requires an employer's adverse action to materially affect the terms and conditions of employment.***" (Emphasis added.)

As discussed in detail above, each of the purported adverse actions cited by Rodriguez simply involved getting a particular work assignment at a particular time. As a matter of law, such actions do not rise to the level of an "adverse employment action." As the Court stated in *Malais v. Los Angeles City Fire Dept.*, 150 Cal.App.4th 350, 358 (2007):

> None of the cases supports the proposition that assignment to a less-preferred position *alone* constitutes an adverse employment action. Because the court properly found that [plaintiff] did not suffer an adverse employment action, it properly granted the Department summary judgment. (Emphasis added.)

Here, each of the purported adverse employment actions cited by Rodriguez involved nothing more than assignment to a particular police officer duty. None of the actions identified by Rodriguez involved any change in his rank as a police officer.[88] None of the actions involved any change in compensation.[89] In fact, Rodriguez had the opportunity to work, and did work, in every one of the assignments he identifies – just not at precisely the times he wanted to work them. Rodriguez was assigned to the SED unit, leaving that unit only when it was disbanded.[90] Rodriguez was

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88 1-CT-159:25-160:2, 1-CT-160:4-5, 1-CT-163:17-20; 3-CT-623:17-20 (undisputed).

89 1-CT-230:4-15, 1-CT-159:25-160:2, 1-CT-168:10-22, 1-CT-235:5-15; 3-CT-623:12-16 (undisputed).

90 1-CT-156:15, 1-CT-238:15-21,1-CT-240:15-20, 2-CT-242:19-20, 2-CT-346:13-23; 3-CT-603:5-9 (undisputed), 3-CT-603:10-16 (undisputed).

assigned to the SRT team.[91] Rodriguez was assigned to work as a Field Training Officer.[92] Thus, even assuming, *arguendo*, that there was some prestige or opportunity for career advancement attendant to having worked in these assignments, it is undisputed that Rodriguez can feature every one of these accomplishments on his resume.

Rodriguez's discrimination and retaliation claims amount to nothing more than the fact that he did not get the precise duty assignments he wanted, precisely when he wanted them. Rodriguez had the opportunity to work, and did work, in every assignment he ever wanted. In fact, at his deposition Rodriguez could not think of a single white officer who had a more successful track record than himself in getting every assignment and duty that they had requested.[93] As a matter of law, Rodriguez simply has not identified any adverse employment action which would support a claim.

2. Rodriguez Cannot Make A Prima Facie Case Regarding The Disbanding Of The SED Unit For Two Additional Reasons.

a) Rodriguez Cannot Make A Prima Facie Case Because There Was No Job Available In SED.

Rodriguez's claims based on the elimination of the SED unit also fail because he cannot make out another element of the prima facie case. The prima facie case "is designed to eliminate at the outset the most ***patently meritless claims,*** as where the plaintiff is not a member of the protected class or was clearly unqualified, ***or where the job he sought was withdrawn and never filled.***" *Guz*, 24 Cal.4th at 354-55 (emphasis added).

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91 2-CT-257:16-23; 3-CT-616:14-17 (undisputed).

92 1-CT-44:19-45:1, 1-CT-159:25-160:2; 3-CT-623:21-24 (undisputed).

Here, the assignment Rodriguez wanted in SED was withdrawn and never filled. Indeed, the SED unit was eliminated entirely. The job simply did not exist any longer. "[T]he failure to prove the existence of a job opening is a fatal defect in a prima facie case of overt discrimination." *Chavez v. Tempe Union High School Dist.*, 565 F.2d 1087, 1091 (9th Cir. 1977).

The absence of an actual available position in SED after the unit was eliminated is fatal to Rodriguez's discrimination and retaliation claims. A claim based on denial of a particular job position requires that an opening for that position actually exist. As the Supreme Court pointed out in *Guz, supra,* at 355 n.21:

> For example, in the seminal case of *McDonnell Douglas*, the court found that one rejected for a job opening could establish a prima facie case of race discrimination by showing that (1) he or she was a member of a racial minority, (2) he or she applied and was qualified ***for an available job***, (3) he or she was rejected, and (4) ***the position thereafter remained open and the employer continued to seek applications from persons with similar qualifications***. (*McDonnell Douglas, supra,* 411 U.S. 792, 802 [93 S. Ct. 1817, 1824].) (Emphasis added.)

Here, the SED position did not remain open, and Burbank did not seek applicants for it. This defect is dispositive of Rodriguez's claims with respect to that position. Rodriguez's claim is, therefore, in the words of our Supreme Court, "patently meritless."

b) Rodriguez Cannot Overcome The "Same Actor Presumption."

Where a FEHA claim is based on the plaintiff losing a job, it is a presumptive defense to the claim if the person who made the challenged

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(...continued)

93 2-CT-317:13-18; 3-CT-627:24-27 (undisputed).

decision is the same person who selected the plaintiff for the job in the first place. As the Court explained in *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal.App.4th 798, 809 (1999) (upholding summary judgment for employer): "[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." *See also West v. Bechtel Corp.*, 96 Cal.App.4th 966, 980–81 (2002).

Here, Rodriguez was assigned to the SED by Captain Janice Lowers in October 2008.[94] It was also Lowers who made the recommendation to Chief Stehr that the SED unit should be disbanded, which it was in May 2009.[95] Thus, the same actor presumption applies. Rodriguez produced no evidence to overcome that presumption.

3. Rodriguez Cannot Raise A Triable Issue Of Fact That Burbank's Stated Reasons For The Challenged Assignments Were Pretextual.

Even if Rodriguez were able to establish a prima facie case of discrimination (he cannot), his discrimination and retaliation claims would still fail. Burbank produced evidence that each of the alleged adverse employment actions occurred for a legitimate reason. In order to overcome this showing, Rodriguez must produce ***specific, substantial*** evidence that Burbank's stated reasons are pretextual. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 361 (2000) (plaintiff must have evidence to support an inference that "intentional discrimination ... was the true cause of the employer's actions") (citation and emphasis omitted); *Horn v. Cushman & Wakefield W., Inc.*, 72 Cal.App.4th 798, 807 (1999) (plaintiff "must

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94 1-CT-240:15-17, 1-CT-156:15.

produce ***specific, substantial evidence of pretext***") (emphasis added); *Martin v. Lockheed Missiles & Space Co.*, 29 Cal.App.4th 1718, 1735 (1994) ("speculation cannot be regarded as substantial responsive evidence").

Here, ***Rodriguez actually testified that his claims are based on speculation***. For example, with respect to the closure of SED, Rodriguez testified that he had "suspicions" that the unit was disbanded for the purpose of depriving him of the opportunity to work in it, but he acknowledged that this is pure speculation on his part.[96] Rodriguez also testified that he had no basis for thinking that Chief Stehr had any dislike for Hispanic or Guatemalan people.[97] When asked whether he believed that the closure of SED had anything to do with his ethnicity or national origin, Rodriguez replied: "Not necessarily, per se."[98] Similarly, Rodriguez testified that he has no information at all about why he was not the first officer selected for the SRT Team, or about the qualifications of the officers who were selected.[99] In fact, Rodriguez testified that his belief that he was retaliated against was just a "feeling" on his part.[100]

(...continued)

95 1-CT-160:7-10, 1-CT-156:17-22.

96 2-CT-244:21-245:10.

97 2-CT-303:11-16.

98 2-CT-315:16-21

99 1-CT-163:22-164:14, 1-CT-164:19-25, 2-CT-258:18-259:1, 2-CT-260:7-22, 2-CT-299:5-19.

100 2-CT-299:5-19; 1-CT-160:5-161:19, 1-CT-163:22-164:14, 1-CT-164:19-25, 2-CT-244:21-245:10, 2-CT-258:18-259:1, 2-CT-260:7-22, 2-CT-303:11-16, 2-CT-315:16-21.

a) There Is No Evidence Of Pretext Regarding The Decision To Disband The SED Unit.

Rodriguez argues that the declarations of Lowers and Chief Stehr, explaining the reasons for disbanding SED, are contradicted by what Captain Lowers told Rodriguez at the time – in particular, referring to an e-mail Lowers sent Rodriguez. There is no such conflict. Captain Lowers' declaration states:

> In or around May 2009, I made the recommendation to Chief Stehr to disband SED. At that time, the Burbank Police Department was facing ***budgetary constraints which had kept the Department from fully staffing SED*** due to staff shortages in its Patrol Division.[101]

The e-mail cited by Rodriguez stated:

> The deactivation [of SED] has nothing to do with your work performance. You are a good worker and I was happy to have you working for me. It is clear that ***we will never be able to fully staff it*** in its present configuration out of Investigations.[102]

Courts have emphatically rejected efforts to defeat summary judgment by citing such non-material deviations in how an employment decision is explained. As the Court stated in *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal.App.4th 798, 815 (1999):

> It is the substance of the reason provided, not the word choice, which is critical. (*Rand v. CF Industries, Inc.* (7th Cir. 1994) 42 F.3d 1139, 1146 [citation of isolated portions of the record in an attempt to show inconsistency fails where review of the cited testimony reveals that--in substance if not word choice--there is unanimity]; *see Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 918 [Reasons given by employer for termination are "***not incompatible, and therefore not properly described as 'shifting reasons***."'

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101 1-CT-156:17-19 (emphasis added).

102 5-CT-1144.

> "Lack of work" and "lack of seniority and poorer performance relative to other mechanics" are not incompatible and are insufficient to raise a genuine issue of fact as to whether employer's reasons for layoff were pretextual.]. (emphasis added)).

There is nothing "incompatible" about Lowers' explanation and what she told Rodriguez at the time (in fact, they are practically verbatim in citing the inability to "fully staff" SED).

Rodriguez also notes the declaration of former Deputy Chief Bill Taylor, who asserts that "budgetary cuts related to SED ... had been addressed and resolved, prior to Elfego Rodriguez being assigned to SED [in October 2008]."[103] Since Taylor admits that he had no input into the decision to disband SED (5-CT-1166:3-4), his observations are irrelevant, but even aside from that it is ludicrous for him to suggest that some unspecified budget cuts made in 2008 would preclude any consideration of the budget in making decisions about how to structure the BPD in May 2009, when the SED was disbanded. There is no incompatibility.

Nor is there anything incompatible about Chief Stehr's explanation that when he accepted Lowers' recommendation he also took into account his own concerns about the supervision of that unit. Rodriguez's Opening Brief mischaracterizes Stehr's declaration as saying that "SED was disbanded because of the 'use of force' allegations related to Sgt. Neil Gunn," and then asserts that this does not make sense because Gunn had already been removed as the Sergeant supervising SED.[104] However, that is not what Stehr's declaration said. Stehr was concerned that, in light of new investigations into alleged use of force, officers assigned to the SED

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103 5-CT-1166:10-11.

104 OB 28.

unit could come under increased scrutiny based on the history of Sergeant Gunn.[105]

b) There Is No Evidence Of Pretext Regarding The SRT Team Assignment.

Regarding the SRT team assignment, Rodriguez's only evidence is the declaration of a co-worker, Christopher Dunn,[106] and of his co-plaintiff, Omar Rodriguez, both of whom opine that the qualifications of the officers selected ahead of Rodriguez were not important to the assignment. However, neither Dunn nor Omar Rodriguez claim to have played any role in selecting officers for SRT. The opinion of a co-worker, or of the plaintiff himself, is irrelevant to the issue of pretext. Only the motive of the decision-maker is at issue. *Banks v. Dominican College*, 35 Cal.App.4th 1545, 1557 (1995) ("Appellant's 'perception of [her]self, however, is not relevant. It is the perception of the decision maker which is relevant.'").[107]

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105 1-CT-161:21-162:3.

106 Dunn has his own lawsuit against the City, in which he is represented by the same attorney as Rodriguez – Los Angeles Superior Court, Case No. BC 417928.

107 "[I]f nondiscriminatory, [the employer]'s true reasons need not necessarily have been wise or correct." *Slatkin v. Univ. of Redlands*, 88 Cal.App.4th 1147, 1157 (2001); *Hersant v. Dep't of Social Services*, 57 Cal.App.4th 997, 1005 (1997) ("...the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.").

c) There Is No Evidence Of Pretext Regarding The Temporary One-Week Training Assignment.

On the temporary, one-week training assignment, Rodriguez argues that the officers chosen for this assignment had not qualified or applied for a FTO position. OB 2:6-13. This mixes apples and oranges. The one week training assignment was not a regular FTO position. Rodriguez offers no evidence that any special qualifications are required, or that any application process exists, for such a temporary assignment. Indeed, the Declaration of Lt. Rosoff explains that he chose other officers precisely because "they previously expressed an interest in being Field Training Officers, and I felt I had a responsibility as a supervisor to assist them in their career development by giving them an opportunity to act as Field Training Officers." 1-CT-166:12-16. Again, Rodriguez fails to show any incompatibility.

In short, Rodriguez offers not a shred of evidence to controvert the clearly established, legitimate reasons for each of the employment actions he challenges. He falls far short of presenting the sort of specific, substantial evidence necessary to raise a triable issue of fact as to whether Burbank's stated reasons are pretextual. *Guz*, 24 Cal.4th at 361.

C. Rodriguez Presented No Evidence To Support A Claim Based On A Disparate Impact Theory.

Rodriguez asserts that the FAC states a disparate impact claim, citing vague allegations in the FAC of a "policy, practice and/or procedure which made it more difficult, if not impossible, for minorities, women and gays, among others, ***to obtain promotions***." (Emphasis added.) In his Opening Brief, Rodriguez reaffirms that his supposed disparate impact claim challenges "the facially neutral employment practice of ***applying and***

testing for promotions."[108] In the alternative, Rodriguez asserts that the Trial Court should have granted him leave to amend his complaint to plead this theory.[109] However, even if Rodriguez's complaint is construed to state such a theory, or even if he had been granted leave to amend to state such a theory, Burbank would be entitled to summary judgment on any such claim, for several reasons.

First and foremost, Rodriguez himself never sought a promotion, and was never denied a promotion. Rodriguez testified:

> Q. Is there any time during your career with the Burbank Police Department that you were denied a promotion? [Objection omitted.]
>
> THE WITNESS: No.[110]

This fact is dispositive of any possible claim of disparate impact in granting promotions. "[B]asic requirements of standing mean that an individual plaintiff must show that the facially neutral policy resulted in discrimination that resulted in personal injury. *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981)." *Bacon v. Honda,* 370 F.3d 565, 577 (6th Cir. 2004). Since Rodriguez was never denied a

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108 OB 31.

109 Rodriguez did not, in fact, plead a claim for disparate impact. The disparate impact theory is not mentioned in the FAC, nor does it plead any of the facts necessary to establish a disparate impact claim, as discussed in this Section. The only specific fact mentioned in Burbank's alleged "failure to promote a single African-American police officer," 1-CT-50:12-14, which has no relevance to Rodriguez since he is not African-American. Failure to plead a disparate impact theory is grounds to uphold summary judgment. *Reminder v. Roadway Express, Inc.*, 215 Fed.Appx. 481, 485 (6th Cir. 2007) (upholding summary judgment where the complaint merely alleged a statistical imbalance in the work force: "Notwithstanding the liberal pleading rules, we agree with the district court's conclusion that plaintiff's complaint did not plead a claim for disparate impact.").

promotion, he ***could not*** have been injured by Burbank's promotion practices.

Second, as Rodriguez acknowledges in his Brief, in a disparate impact case, "[t]he plaintiff must begin by identifying the specific employment practice that is challenged."[111] Rodriguez makes no effort to do so. Instead, he claims to challenge "the facially neutral employment practice of ***applying and testing for promotions***."[112] This generality is insufficient to form the basis for a disparate impact claim. "Plaintiffs generally cannot attack an overall decision-making process ...but must instead identify the ***particular element or practice within the process that causes an adverse impact.***" *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (emphasis added). Rodriguez identifies nothing.

Third, Rodriguez identifies no statistical evidence of any disparate impact. Every element of the necessary statistical analysis is missing. Rodriguez offered no evidence of the relevant applicant pool for promotions, nor of a statistically significant differential in the relative success rate of applicants in different ethnic categories, nor of the fact that the challenged facially neutral employment practice was the reason for the statistical differential. Rodriguez's only "evidence" is his observation that there are 25 Hispanic police officers in the BPD, out of 165 total, and that the percentage of Hispanic officers in some other law enforcement agencies is higher. This statistic is meaningless. Besides having nothing at all to do with the issue of promotions, it says nothing about the BPD in general. As the Court noted in *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991):

(...continued)

110 1-CT-231:15-20.

111 OB 31.

> "Statistics such as these, however, without an analytic foundation, are virtually meaningless. To say that very few blacks have been selected by Honda does not say a great deal about Honda's practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants." (Emphasis added; citations omitted.)

In his opposition to the motion for summary judgment below, Rodriguez treated his existing FAC as if it pled a disparate impact claim. He presented all of his evidence and arguments in support of that claim. As the foregoing discussion demonstrates, Burbank was entitled to summary judgment on any such claim, pled or not. Rodriguez's argument that the Trial Court should have permitted him to amend his Complaint to more clearly allege a disparate impact theory is a red herring. No matter how pled, Rodriguez's purported disparate impact theory is without merit.

D. Rodriguez Offered No Evidence Of Actionable Harassment.

1. The "Harassment" Alleged By Rodriguez Was Not Severe Or Pervasive.

Under FEHA an employee may not recover for every offensive or harassing act. To recover for hostile environment harassment a plaintiff must establish (1) he belongs to a protected group; (2) he was subjected to unwelcome acts or works based on his protected status; (3) the workplace was permeated with discriminatory intimidation, ridicule and insult that is so pervasive or severe it altered the conditions of employment and created an abusive working environment; and (4) respondeat superior. *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590, 610 (1989); *Aguilar v.*

(...continued)

112 *Id.*

Avis Rent A Car System, Inc., 21 Cal.4th 121, 130 (1999) ("not every utterance of a racial slur in the workplace violates the FEHA"). The plaintiff must prove conduct that is both objectively offensive to a reasonable person, and subjectively offensive to the victim. *Id.* "[O]ccasional, sporadic, or isolated (i.e., not pervasive) incidents of verbal abuse are not actionable." *Etter v. Veriflo Corp.* 67 Cal.App.4th 457, 464 (1998).

Here, Rodriguez's harassment claim is based almost entirely on vague memories of hearing a few words which he interpreted as offensive, without any supporting details as to who used the words or in what context.[113] Such vague assertions cannot form the basis for establishing a hostile work environment. *See e.g., Lyle v. Warner Brothers Television Productions*, 38 Cal.4th 264, 291 (2006) (upholding summary judgment for the employer: "[P]laintiff asserted [three co-workers] used epithets 'regularly' .... Her vagueness about this point and the circumstances surrounding the incidents did not aid in showing that use of epithets contributed to an objectively abusive or hostile work environment").[114]

Further, when interviewed by Irma Rodriguez Moisa in the course of a 2008 investigation into possible harassment in the BPD, Rodriguez told Moisa that all such remarks which he heard had happened years before, during his first year or so as a BPD police officer.[115] During his deposition, Rodriguez affirmed that his report to Moisa was accurate and complete, and

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113 2-CT-305:4-306:2, 2-CT-307:14-309:4, 2-CT-310:3-311:9, 2-CT-312:21-313:21.

114 *See also Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994) (affirming dismissal at close of employee's case-in-chief: Plaintiff's harassment claim "is ***not substantiated by accounts of specific dates, times or circumstances***. Such general allegations do not suffice to establish an actionable claim of harassment.") (emphasis added).

115 2-CT-274:6-18, 2-CT-280:5-16.

then ***reaffirmed under oath that he had heard no such offensive remarks after his first year or so in the BPD.***[116]

Where Rodriguez does actually remember any details about any allegedly offensive comments, the comments he remembers are remarkably mild. Rodriguez's main complaint is about Sgt. Frank's offhand remark that Rodriguez "look[ed] like the bad guys we chase."[117] Rodriguez chose to take this as an ethnic comment, although Frank's declaration establishes that he did not mean the remark that way.[118] Similarly, Rodriguez took offense at remarks written on a dry erase board in the Detective Bureau, although the supposed offensiveness of these writings rested on the simple use of the words "100 percent," which Rodriguez had heard Armenians (including Armenian officers in the BPD) use.[119]

Rodriguez identified only two BPD officers who made explicitly ethnic remarks: Aaron Kendrick and Jared Cutler. Officer Kendrick was disciplined as a result of Moisa's investigation and a follow-up internal investigation.[120] Officer Cutler left the Department before any discipline could be considered.[121] Rodriguez testified that the only people he believed deserved discipline for any harassing, discriminatory or retaliatory conduct were Kendrick, Cutler, Frank (for the "bad guys we chase" comment), and whoever wrote the remarks on the dry erase board.[122]

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116 2-CT-270:11-271:5, 2-CT-280:5-16.

117 2-CT-293:13-23.

118 1-CT-167:8-13, 1-CT-167:17-20.

119 2-CT-263:11-21, 2-CT-264:18-265:6, 2-CT-287:13-20, 2-CT-287:21-290:25, 2-CT-291:16-292:15, 2-CT-319, 3-CT-637:9-13 (undisputed).

120 1-CT-159:21-23, 2-CT-280:17-23.

121 1-CT-159:21-23, 2-CT-280:24-281:12.

122 2-CT-284:18-286:11; 3-CT-638:8-14 (undisputed).

The conduct alleged by Rodriguez falls far, far short of the sort of severe and pervasive harassment necessary to survive summary judgment. *See e.g., Haberman v. Cengage Learning, Inc.*, 180 Cal.App.4th 365, 379 (2009) ("There is no recovery 'for harassment that is occasional, isolated, sporadic, or trivial."); *Etter v. Veriflo Corp.*, 67 Cal.App.4th 457, 467 (1998) (observing that "the law does not exhibit 'zero tolerance' for offensive words and conduct"). Far more offensive conduct has been held insufficient for a harassment claim to survive a summary judgment motion. *See e.g., Kelley v.The Conco Companies*, 196 Cal.App.4th 191, 198, 207 (2011) (upholding summary judgment where plaintiff's supervisor had previously called him a "bitch," a "fucking punk," and said that he wanted to "fuck [him] in the ass," among other things, but the conduct had stopped: "[A]lthough Kelley alleges conduct by Seaman that was patently offensive, the evidence Kelley presented failed to show pervasive hostile conduct").

2. Rodriguez Cannot Base A Harassment Claim On Co-Worker Gossip About Random Comments Which Were Neither Directed At, Nor Witnessed By, Rodriguez.

Recognizing that he has no evidence of any actual harassment, Rodriguez attempts to demonstrate a hostile work environment primarily by citing rumors and gossip about random remarks, mentioned by third party witnesses, with no details as to the context of the remarks or when they occurred.[123] Coworker gossip is not "substantial evidence," sufficient to

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123 Rodriguez's voluminous evidence makes no mention of ***who*** allegedly engaged in the offensive conduct, ***when*** it occurred or in ***what context***. These vague assertions provide no basis for inferring discrimination or harassment. *See e.g., Lyle v. Warner Brothers Television Productions*, 38 Cal.4th 264, 291 (2006) (upholding summary judgment for the employer: "plaintiff asserted [co-workers] used epithets 'regularly' ... .
(...continued)

show harassment. *Beyda v. City of Los Angeles*, 65 Cal.App.4th 511, 518-522 (1998) ("[W]e caution that mere workplace gossip is not a substitute for proof. Evidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule"). In particular, Rodriguez cites two comments that he heard about indirectly (OB 34): First, Rodriguez cites Chief Stehr's use of the "n-word," without ever attempting to place that event in context. The undisputed evidence shows that Stehr used that word to give an example of the type of language which would not be tolerated by the BPD.[124] The word was not used as a slur or an epithet, and when placed in context it was in no way offensive. Furthermore, Rodriguez testified that when he heard about this comment, what he heard was that the Chief had cited the word as an example of language that would not be tolerated by the city.[125]

Second, Rodriguez argues that his co-plaintiff, Karagiosian, told him he witnessed "a detective's reference to a female murder victim as 'not human' simply because she was Armenian."[126] However, Rodriguez's deposition testimony about this third-hand comment shows that there was

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(...continued)
Her vagueness about this point and the circumstances surrounding the incidents did not aid in showing that use of epithets contributed to an objectively abusive or hostile work environment."); *Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994) (Plaintiff's harassment claim "is not substantiated by accounts of specific dates, times or circumstances. Such general allegations do not suffice to establish an actionable claim of harassment."). Rodriguez's approach has been derided by courts as an impermissible "parade of witnesses" approach. *See e.g., Moorhouse vs. Boeing Co*,. 501 F.Supp. 390, 393, n.4, (E.D. Pa.) *aff'd*, 639 F.2d 774 (3d. Cir. 1980) ("even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each re-counting his contention that defendant [discriminated against him]").

124 9-CT-1936:13-1937:15.

125 *Id.*

nothing about the comment referring to the victim or to Armenians in any way.[127]

Even assuming that there had been anything "harassing" about either of these comments, neither of them was directed at Rodriguez, or even at any group of which Rodriguez is a member. Rodriguez is neither African-American nor Armenian. The California Supreme Court has noted that actionable harassment must be directed at the plaintiff or other members of the class of which plaintiff is a member:

> [A] hostile work environment sexual harassment claim ***is not established*** where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, ***without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general.*** (*E.g., Brown v. Henderson* (2d Cir. 2001) 257 F.3d 246, 250, 256 [coworkers' steady stream of obscene conversation and vile talk, posting of sexual pictures, and drawing of a vulgar picture, did not constitute harassment because of sex]; *Moore v. Grove North America, Inc.* (M.D. Penn. 1996) 927 F.Supp. 824, 830 [male supervisor's repeated use of offensive four-letter word to and in front of the plaintiff did not create a hostile work environment, where he also swore at her male counterparts and did not make sexual innuendos or use gender-related language toward the plaintiff or women in general].) (Emphasis added.)

(...continued)

126 OB 34.

127 Rodriguez testified: "Q What did he tell you that led you to believe that the reference of that comment was the murder victim? A I think they were the way he related to me they were speaking about catching the suspect, and then the comment was made that shouldn't work too hard or too long or something to that effect because there was no humans involved." 9-CT-1939:18-25. There is nothing self-evidently ethnic or harassing about this remark. Again, Rodriguez takes a remark without any context, and "spins" it as harassment.

In fact, Karagiosian's declaration states that what he actually heard was the phrase "NHI," which Karagiosian ***interpreted*** as meaning "no human involved." 5-CT-1148:1-3.

Lyle v. Warner Brothers Television Productions, 38 Cal.4th 264, 282 (2006). *See also Thompson v. City of Monrovia*, 186 Cal.App.4th 860, 877-78 (2010) (citing authority which ***rejects "the notion that an employee who observes workplace hostility but is not a member of the class of persons at whom the harassment was directed may bring a derivative claim for the harassment."***) (emphasis added).[128]

3. Rodriguez's Harassment Claims Are Time-Barred.

FEHA claims are subject to a one-year time period for filing the prerequisite DFEH complaint. Cal. Gov. Code, § 12960(d). Rodriguez did not file a DFEH complaint until May 27, 2009.[129] Rodriguez testified that all, or nearly all, of the allegedly harassing conduct he witnessed occurred during the first year or so that he worked in the BPD after joining the Department in 2004.[130] This fact alone is fatal to Rodriguez's harassment claim. Even assuming that the alleged conduct was severe and pervasive (which it was not), Rodriguez's claim is barred as untimely.

Rodriguez argues that his claim can be salvaged under the continuing violation doctrine.[131] However, the continuing violation

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128 The recent case of *Pantoja v. Anton*, 198 Cal.App.4th 87 (2011), does not assist Rodriguez. That case held that evidence that an alleged sexual harasser had harassed women other than the plaintiff could be relevant to show that the harasser's motive was based on sex.

In the instant case, the only incidents of alleged harassment where Burbank has argued a non-discriminatory motive are Chief Stehr's use of the "n-word," and Kelly Frank's comment that "You look like the bad guys we chase." If Rodriguez were to cite some evidence of Stehr using the "n-word" as an epithet, or of Frank harassing other Hispanic employees, such evidence would be relevant to rebut their respective explanations of their remarks. However, Rodriguez does not cite any other alleged conduct by Stehr or Frank.

129 1-CT-46:24-47:4, 1-CT-100; 3-CT-639:12-13 (undisputed).

130 2-CT-274:6-18, 2-CT-280:5-16.

131 OB 38.

doctrine requires ***current*** offensive conduct. An employer may face liability under the continuing violation doctrine for unlawful conduct outside FEHA's one year administrative filing deadline if the conduct is ***sufficiently connected to conduct within the one year period***, and if the conduct (1) is "sufficiently similar in kind" to the timely alleged conduct; (2) "occurred with reasonable frequency" (as distinguished from an isolated work assignment or an employment decision); and (3) "ha[s] not acquired a degree of permanence" so that employees are on notice that further efforts to resolve the allegedly unlawful conduct "will be futile." *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 812, 823 (2001). Thus, an employee must present more than objectionable old conduct to establish a continuing violation. *Cucuzza v. City of Santa Clara,* 104 Cal.App.4th 1031, 1042 (2002). "[W]hen the harassing conduct is not ***severe in the extreme***, more than a few isolated incidents must have occurred to prove a claim based on working conditions." *Lyle,* 38 Cal.4th at 284 (emphasis added).

In his Opening Brief, Rodriguez cites one and only one fact in support of his reliance on the continuing violation doctrine: "Appellant was placed on notice by Lt. Dermenjian that his complaints would only cause him trouble with the department approximately one month prior to SED being disbanded in May, 2009."[132] This assertion actually has nothing to do with the existence of any alleged harassment. If anything, it tangentially relates to Rodriguez's claim that SED was disbanded for retaliatory reasons, discussed above. Leaving that aside, however, this assertion misrepresents the record and directly contradicts Rodriguez's own testimony on the subject. In support of this assertion, Rodriguez cites his own Declaration, which states:

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132 OB 38.

> ¶ 30. Steve Karagiosian told me he intended to notify Lt. Dermenjian. About a week later Lt. Dermenjian came to the SED office and when both Steve and I were there, ***he cautioned us to pick our battles carefully***, that it would be best for us to ignore the entire incident, but that he would speak to Chief Stehr about it. ...[133]

In his deposition, Rodriguez testified that Dermenjian merely told Rodriguez's co-plaintiff Steve Karagiosian that he should "pick and choose his battles."[134] Thus, Rodriguez misrepresents a passing comment Lt. Dermenjian made to a third person as an implied threat against Rodriguez, and then relies on that misrepresentation, contradicting his own deposition testimony in the process, as the only evidence cited in support of his continuing violation argument.[135]

E. The Trial Court Properly Granted Summary Judgment As To Rodriguez's "Failure To Prevent" Claims.

Rodriguez's Fifth Cause Of Action for "failure to prevent" discrimination, retaliation and harassment is dependent on showing that there was, in fact, actionable discrimination, retaliation or harassment.

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133 5-CT-1139:21-24; 5-CT-1140:6-8 (emphasis added).

134 Rodriguez testified: "[H]e said that Steve should pick and choose his battles, that he didn't want to tarnish his name, or something to that effect." 8-CT-1920:11-25.

135 Rodriguez enlists his co-plaintiffs to contradict their deposition testimony as well. For example, Omar Rodriguez's declaration says that he questioned Chief Stehr about why Rodriguez was not among the first officers selected for SRT, and that the Chief responded that he was "sick and tired" of hearing about Rodriguez. 5-CT-1160:12-19. In Omar Rodriguez's ***deposition***, however, he testified that it was he (Omar Rodriguez) who was "getting a little tired of hearing the complaints," and that he told E. Rodriguez "Well, you either complain about it - okay? - or you don't complain about it." 9-CT-1947:10-17. It is undisputed that,

(...continued)

Thus, if Rodriguez's underlying claims fail, as they do, his "failure to prevent" claim must also fail. *Trujillo v. North County Transit District*, 63 Cal.App.4th 280, 289 (1998) ("[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen ... . Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented."). *See also Carter v. California Dept. of Veterans Affairs*, 38 Cal.4th 914, 925, fn. 4 (2006).

Rodriguez's Brief in the Trial Court conceded that his "failure to prevent" claim could only survive to the extent that his underlying claims survived.[136]

F. Rodriguez Claim Under POBRA Fails As A Matter of Law.

In his Sixth Cause Of Action, Rodriguez purports to state a claim for violation of the Public Safety Officers Procedural Bill of Rights ("POBRA") Gov't Code §§ 3304, 3309. The claim is frivolous, and Rodriguez does not even bother to address it in his Opening Brief. In his opposition to the motion below, Rodriguez conceded that Burbank was entitled to judgment on his POBRA claims. He simply asserted that he would file new POBRA claims based on unspecified events which occurred after the filing of the FAC.[137]

(...continued)
notwithstanding Stehr's supposed threat, Rodriguez ***was assigned*** to the SRT team. 2-CT-257:19-23; 3-CT-616:14-17 (undisputed).

136 OB 20:3-10.

137 OB 20:16-17.

The POBRA claim fails for several reasons. First, the claim as pled does nothing more than recast Rodriguez's discrimination, retaliation and harassment claims under FEHA as being violations of POBRA as well. POBRA does not create an alternate remedy for FEHA claims. It deals, rather, with procedural rights which police officers enjoy in cases where discipline is imposed or promotions are denied.

Second, as demonstrated above, Rodriguez's discrimination, retaliation and harassment claims under FEHA all fail on their merits. Even if Rodriguez could recast those claims as arising under POBRA, rather than FEHA, they would be no more able to survive summary judgment as POBRA claims than as FEHA claims.

Third, all relevant provisions of POBRA deal specifically with the imposition of discipline or the denial of promotions. Here, it is undisputed that Rodriguez was never disciplined and was never denied a promotion.[138]

Fourth, Rodriguez never filed a claim alleging any POBRA violation under the Government Claims Act. Cal. Gov't Code, §§ 905, *et seq.* Failure to timely present a government tort claim bars a plaintiff from filing a lawsuit against the public entity. *State of California v. Superior Court of Kings County (Bodde)*, 32 Cal.4th 1234, 1239 (2004). These requirements apply to POBRA claims. *Lozada v. City and County of San Francisco*, 145 Cal.App.4th 1139, 1153 (2006). Here, Rodriguez filed his government claim with the City on May 27, 2009.[139] Rodriguez's government claim form makes no mention of any claim under POBRA.[140] This defect is fatal to Rodriguez's POBRA claim.

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138 1-CT-231:15-20, 2-CT-314:22-23.

139 1-CT-46:24-47:4, 2-CT-412-416.

140 *Id.*

G. Rodriguez's Seventh Cause Of Action For "Injunctive Relief" Does Not State A Claim.

Rodriguez's Opening Brief does not mention his Seventh Cause Of Action for injunctive relief. This is not a cause of action at all, but a request that the court grant injunctive relief as a remedy for other causes of action. *See McDowell v. Watson*, 59 Cal.App.4th 1155, 1159 (1997) ("Injunctive relief is a remedy and not, in itself, a cause of action ....") citing *Shell Oil Co. v. Richter*, 52 Cal.App.2d 164, 168 (1942). Accordingly, this purported cause of action must fail along with Rodriguez's other claims.

H. The Trial Court Did Not Abuse Its Discretion By "Not Allowing Appellant To Amend The Complaint."

More than a year after Rodriguez filed this lawsuit, Rodriguez's employment with the BPD was terminated based on his use of excessive force and dishonesty. Rodriguez has filed a lawsuit in federal court, Case No. 2:11-cv-04858-GW, challenging his termination under FEHA, POBRA, and various federal civil rights statutes.[141] Burbank has asked this Court to take judicial notice of the Complaint in that action. That Complaint states, in relevant part:

> Plaintiff was terminated in June 2010, purportedly for his "use of force" ... and for his general failure to be "honest" about it thereafter.[142]

On April 2, 2010, more than two months before Rodriguez was terminated and more than a month before the scheduled hearing on the motion for summary judgment, Rodriguez applied *ex parte* to continue the hearing on the summary judgment motion on the ground that Rodriguez

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141 Request For Judicial Notice, Exhibit 1.

"intended" to seek leave to amend his complaint. The *ex parte* application stated:

> Plaintiffs intend to file a motion for leave to amend this Complaint to (a) include ***the new facts of Plaintiffs Elfego and Omar Rodriguez' wrongful terminations*** [Rodriguez's co-plaintiff, Omar Rodriguez was terminated at the same time as Rodriguez] in violation of FEHA and POBRA, and (b) plead a claim for disparate impact in the Complaint.[143]

(Rodriguez's proposed amendment to plead a claim for disparate impact is discussed in Section IV(C), above.)

Rodriguez never made a motion for leave to amend his complaint. Nor did his co-plaintiff, Omar Rodriguez, ever make such a motion, despite the fact that Burbank's motion for summary judgment as to Omar Rodriguez's claims was not heard until more than a year later.[144] Rodriguez never lodged a proposed amended complaint with the Trial Court. He did not attempt to obtain a hearing date on his "intended" motion for leave to amend before the scheduled date of the summary judgment motion, even though there was ample time for a noticed motion to be heard before the summary judgment hearing.

Now, on appeal, Rodriguez contends that the Trial Court erred by "not allowing Appellant to amend the complaint."[145] This contention is frivolous, for many reasons.

(...continued)

142 Request For Judicial Notice, Exhibit 1, ¶16.

143 3-CT-547:13-15.

144 Request For Judicial Notice, Exhibit 3.

145 OB 11.

1. The Trial Court Could Not Have Erred By Denying A Motion That Was Never Made.

A party seeking to amend his complaint must make a formal motion with written notice and must "[i]nclude a copy of the proposed amendment or amended pleading." C.C.P. Section 473(a)(1); C.R.C. Rule 1324(a)(1); *see also* Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2000) ¶ 6:666, pp. 6-170 & 6-171 (rev.# 1, 2010) ("A regular noticed motion must be filed. An amendment making substantive changes ***cannot*** be allowed ex parte[.]").

Rodriguez never made any such motion. Even his co-plaintiff, Omar Rodriguez, never made such a motion, despite the fact that he had more than a year to do so. (Omar Rodriguez has also filed a federal court lawsuit challenging his termination.) There is nothing in the record to tell this Court what facts such an amended motion would have alleged. Like his "intention" to seek leave to amend below, Rodriguez's appeal to this Court is based on nothing more than speculation that he might have somehow survived summary judgment by bringing new claims in an amended complaint. "[I]n absence of proposed amendment, it will be 'almost impossible to show an abuse of discretion in denying a motion for leave to amend.'" 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1200, p. 632).

Burbank has been prejudiced in addressing Rodriguez's arguments on this appeal by his failure to make an actual motion to amend in the Trial Court. Burbank was deprived of any opportunity to make a record in the Court below by opposing such a motion. For example, in opposing such a motion in the Court below, Burbank would have demonstrated (among other things) that Rodriguez has pursued an administrative appeal of his

discharge.[146] This fact, which is not in the record because Rodriguez never made the requisite motion, would have barred any amendment to the complaint in the Trial Court under the doctrine of "exhaustion of judicial remedies." *See, e.g., Johnson v. City of Loma Linda*, 24 Cal.4th 61 (2000); *Page v. Los Angeles County Probation Dept.*, 123 Cal.App.4th 1135 (2004). Under that doctrine, a public employee who chooses to challenge an employment action in an internal administrative proceeding must pursue that proceeding to its conclusion, which includes seeking a writ of mandate to review the administrative decision, before he can bring a separate civil suit.[147]

2. Even If The Trial Court Had Denied A Motion For Leave To Amend, It Would Not Have Abused Its Discretion Because Rodriguez Suffered No Prejudice.

Rodriguez has suffered no prejudice as a result of the Trial Court ruling on the complaint he actually filed, rather than some hypothetical amended complaint he "intended" to file. Any claims Rodriguez may have that his subsequent termination was wrongful can and will be heard in his federal lawsuit. "[A] trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or

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146 Request For Judicial Notice, Exhibit 2.

147 Likewise, "no basis exist[ed] to consider [Burbank's] summary judgment motion as seeking judgment on the pleadings" and allow Rodriguez to amend his complaint because Burbank's motion was supported by extrinsic evidence and did not rely solely on the pleadings. *Melican v. Regents of University of California*, 151 Cal.App.4th 168, 175 (2007). The Trial Court therefore properly exercised its discretion in not construing Burbank's motion as a motion for judgment on the pleadings. *Id.*

gross abuse of discretion is shown." *Melican v. Regents of University of California*, 151 Cal.App.4th 168, 175 (2007) (citations omitted).

Even if an amended complaint alleging additional claims had been filed, the Trial Court still would have had to rule on the claims alleged in the FAC. Thus, denial of a motion to amend (assuming one had been made) would have had no impact whatsoever on the outcome of the motion for summary judgment below.

3. Rodriguez Could Not Have Amended His Complaint In Any Event.

At the time Rodriguez announced his "intention" to amend his complaint in the Court below, he had not been terminated. As Rodriguez acknowledges in his Opening Brief, "On March 30, 2010, Appellant was notified that the Department ***intended*** to terminate him."[148] A notice of intent is merely one step in the administrative process by which a public employee can, eventually, be terminated. Rodriguez's federal court complaint acknowledges that he was not ***actually*** terminated until June 2010.[149]

Under well-settled law, a cause of action does not "accrue" until after some wrongful act is done. *See e.g., Howard Jarvis Taxpayers Assn. v. City of La Habra*, 25 Cal.4th 809, 815 (2001) (a cause of action does not accrue until "the occurrence of the last element essential to the cause of action") (citations omitted); 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 493, p. 633 ("The cause of action ordinarily ***accrues*** when, under the substantive law, the wrongful act is done and ***the obligation or liability arises***, i.e., when a suit may be brought."). Here, when summary

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148 OB 11 (emphasis added).

149 Request For Judicial Notice, Exhibit 1, ¶16.

judgment was granted on May 21, 2010, Rodriguez was still an employee of Burbank. Rodriguez could not defeat Burbank's right to have its motion heard by speculating about possible future events which might give rise to new claims.

4. Burbank Would Have Been Prejudiced By An Amendment To The Complaint, Raising New Issues Based On New Events.

At the time Burbank's motion for summary judgment was heard, the action below had been vigorously litigated for almost a year. Discovery as to Rodriguez's claims was complete, and Burbank had invested significant time and money preparing its motion. Any amended complaint alleging new claims based on new facts (indeed, based on facts which had not even happened as yet) would have required the parties to go back to "square one" in the litigation. This would have entailed reopening discovery and filing a new motion addressing entirely new claims.

5. The Case Cited By Rodriguez Is Distinguishable On Every Single Issue Raised Above.

Rodriguez's appeal on the amended complaint issue relies entirely on *Honig v. Financial Corp. of America*, 6 Cal.App.4th 960 (1992). That reliance is misplaced. *Honig* differs from the instant case in every respect discussed above.

First, the plaintiff in *Honig* actually made a motion for leave to amend. *Id.* at 965.

Second, the plaintiff in *Honig* ***did*** suffer actual prejudice as a result of leave to amend being denied, because the statute of limitations had expired on his new claim and, without the "relation back" doctrine

applicable to an amended pleading, the plaintiff would have had no remedy. *Id.* at 966.

Third, the facts giving rise to the new claim asserted by the plaintiff in *Honig* had actually happened. The proposed amendment there involved changing a claim of constructive discharge to a claim of actual discharge. *Id.* at 963, 965.

Fourth, the proposed amendment in *Honig* was a single paragraph, which did not raise an entirely new issue based on an entirely different employment action. The amended complaint there would not have required reopening discovery because, as the *Honig* court noted, "Respondents thoroughly deposed appellant on the events which occurred subsequent to the filing of the initial complaint." *Id.* at 963.

For all the foregoing reasons, the Trial Court did not error by "denying" leave to amend the complaint. Even if there had been some error, however, the error would have been harmless. Rodriguez is still free to pursue, and is pursuing in federal court, his claims relating to his discharge. Rodriguez makes no showing that any potential amendment to add ***new claims*** would have altered the outcome regarding his ***existing claims*** one iota.

I. The Trial Court's Rulings On Burbank's Evidentiary Objections Were Proper.

A trial court's evidentiary rulings on summary judgment are reviewed for abuse of discretion. *See Walker v. Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1169 (2002). Evidentiary rulings must be affirmed unless the reviewing court finds that the trial court 'exceed[ed] the bounds of reason' in making its rulings. *Denham v. Superior Court*, 2 Cal.3d 557, 566 (1970), *quoting Loomis v. Loomis,* 181 Cal.App.2d 345.

Rodriguez appeals from numerous evidentiary rulings. All of the evidence at issue in these rulings is discussed in context, in the discussion of the merits, above. Space constraints prevent Burbank from addressing each of these issues at length again here, although they are addressed individually in Burbank's objections to evidence filed in the Court below.[150] However, each item of evidence at issue suffers from one or more of the following defects:

The evidence contradicts Rodriguez's own sworn deposition testimony.

The undisputed facts supporting Burbank's motion were taken almost entirely from Rodriguez's own sworn deposition testimony. The only exceptions were matters which Rodriguez himself stated he could not testify about because he did not know (including Burbank's reasons for the challenged assignments), and a few specific dates and details of the assignments. Rodriguez cannot defeat summary judgment by filing declarations which are inconsistent with his deposition testimony. *See Guthrey v. California*, 63 Cal.App.4th 1108, 1120 (1998); *Prilliman v. United Air Lines, Inc.*, 53 Cal.App.4th 935, 961 (1997) (citing *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 21-22 (1974)); *Soules v. Cadam, Inc.*, 2 Cal.App.4th 390, 398 n.2 (1991) ("'The assertion of facts contradicting prior deposition testimony does not constitute substantive evidence of the existence of a triable issue of material fact.'") *quoting Thompson v. Williams,* 211 Cal.App.3d 566, 574 (1989), *disapproved of on other grounds in Turner v. Anhueser-Busch, Inc.*, 7 Cal.4th 1238 (1994).

The evidence lacks foundation.

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150 8-CT-1745-1909.

Section 437c(d) of the California Code of Civil Procedure provides: "Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations."

Much of Rodriguez's "evidence" consists of bald assertions that various offensive terms were used, without any foundation as to who used the terms, when they were used, in what context the were used, or how the declarant learned about their use. It is a declarant's burden to show affirmatively that testimony is based upon his or her personal knowledge; a conclusory assertion is insufficient. C.C.P. §437c(d); *Hayman v. Block*, 176 Cal.App.3d 629, 638 (1986) ("Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations."); *Keniston v. American Nat. Ins. Co.*, 31 Cal.App.3d 803, 813 (1973) ("Virtually no facts were set forth..., much less a showing made that matters stated were within the personal knowledge of the declarants, and that they could testify competently thereto.").

The evidence consists of speculation and conclusory assertions – often about someone else's state of mind.

A party may not defeat summary judgment by filing declarations which contain mere conclusory allegations unsupported by factual data. *C.L. Smith Co., Inc. v. Roger Ducharme, Inc.*, 65 Cal.App.3d 735, 743 (1977) ("[W]hen used in a declaration filed in opposition to a motion for summary judgment, conclusions are insufficient to raise triable issues of fact."); *Haberman v. Cengage Learning, Inc.*, 180 Cal.App.4th 365, 388 (2009) ("general and conclusory statement is insufficient to establish a triable issue of material fact"). Declarations opposing summary judgment motions are deficient where they are speculative. *Visueta v. General*

Motors Corp., 234 Cal.App.3d 1609, 1615 (1991) ('[T]he opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture or speculation.') *quoting Buehler v. Alpha Beta Co.*, 224 Cal.App.3d 729 (1990).

The evidence consists of improper lay opinion testimony.

"'Opinions... even though uncontradicted, are worth no more than the...factual data upon which they are based.'" "If an opinion 'is not based upon facts otherwise proved it cannot rise to the dignity of substantial evidence.'" *Hoover Community Hotel Dev. Corp. v. Thomson*, 167 Cal.App.3d 1130, 1137 (1985) (citations omitted).

Turning then to the specific items of evidence raised by the appeal, it is clear that the Trial Court properly excluded all of the evidence.

Objections 110 and 126 (Omar Rodriguez's opinion that when Chief Stehr used the "n-word," it "was clear in his tone that he regretted that the term could no longer be used publicly," and Taylor's assertion that Taylor "did not interpret" Stehr's comment as an effort to teach anyone that the word would not be tolerated). These are pure opinion and speculation about Stehr's state of mind. What Stehr actually said, and what Rodriguez heard about it, are undisputed. *See* fn. 124, 125.

Objections 8 and 101 (Rodriguez's claim that "during the past two years I have heard the term `wetback,' `Julios,' `gardeners,' and `half-breed' used on Burbank Police Department premises on numerous occasions," and similar testimony). This directly contradicts Rodriguez's deposition testimony that he had heard no such language after his first year in the BPD, and is not based on any foundation – not even whether the words used "on the [BPD] ***premises***" were used by, for example, suspects in custody rather than other police officers. *See* fn. 20, 21.

Objections 134-238. All of these objections were to random assertions by various individuals that they had heard (or heard about) some type of offensive conduct. There is no proper foundation for any of it, and it is totally irrelevant in light of Rodriguez's own testimony that he did not hear any of it. *See* Section IV(D)(2).

Objections 122-124 (Taylor's declaration opining that Stehr did not eliminate SED for budgetary reasons). Taylor's own declaration establishes that he was not involved in the decision-making process. The proffered testimony lacks foundation and is speculation. *See* fn. 103, and 5-CT-1166:3-4.

Objections 118-119 (Taylor's opinion that experience in SED is helpful to an officer's growth). This is speculation by Taylor, and is utterly irrelevant since it is undisputed that Rodriguez was, indeed, assigned to SED. *See* fn. 39.

Objections 125 and 127 (Taylor's assertion that unspecified "minority recruits" were discriminated against and unspecified allegations of harassment were not investigated). Again, these are conclusory assertions, with no foundation and certainly with no possible relevance to Burbank's motion. The issue in this case is about what happened to Rodriguez – not about what happened to some unspecified member of some unspecified minority group.

V. CONCLUSION

The Trial Court's ruling granting summary judgment on Rodriguez's claims was manifestly correct. Burbank established undisputed facts, based primarily on Rodriguez's own sworn admissions. Rodriguez offers nothing

but a mountain of speculation. The judgment of the Trial Court should be affirmed.[151]

DATED: September 2, 2011

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151 Rodriguez also asks this Court to reassign the entire case to a different judge if the matter is remanded because Rodriguez "believes [Judge O'Donnell] can no longer maintain an appearance of fairness" based on her rulings on the MSJ and on unspecified "other issues." OB 3. Rodriguez's request should be denied. Appellate discretion to disqualify a judge "should be exercised sparingly, and only if the interests of justice require it." *Hernandez v. Superior Court*, 112 Cal.App.4th 285, 303 (2003). "The interests of justice require it, for example, where a reasonable person might doubt whether the trial judge was impartial, or where the court's rulings suggest the 'whimsical disregard' of a statutory scheme." *Id.* (citations omitted). Here, Rodriguez does not say why Judge O'Donnell "can no longer maintain an appearance of fairness" or cite anything in the record to support the assertion. Indeed, there is nothing in the record that the interests of justice would require Judge O'Donnell's disqualification.

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Respondents is produced using 13-point Times New Roman type including footnotes and contains approximately 13,130 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: September 2, 2011

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sued as an independent entity named
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DEPARTMENT")

ORIGINAL

SEP - 2 2011

Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

COURT OF APPEAL - SECOND DIST.
FILED
SEP 2 2011
JOSEPH A. LANE Clerk
Deputy Clerk

ELFEGO RODRIGUEZ, et al.,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

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PROOF OF SERVICE

42729-00001

Elfego vs. City of Burbank – Court of Appeal No. B227414
Appeal from *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

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Elfego vs. City of Burbank – Court of Appeal No. B227414
Appeal from *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

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1. **RESPONDENT'S BRIEF**
2. **MOTION TO TAKE JUDICIAL NOTICE OF (1) PLAINTIFF AND APPELLANT ELFEGO RODRIGUEZ'S COMPLAINT FILED IN UNITED STATES DISTRICT COURT, CENTRAL DISTRICT, CASE NO. CV11-04858-ODW-PJWx ; (2) DECLARATION OF SERGIO BENT FILED IN THAT SAME LAWSUIT; (3) MAY 18, 2011 MINUTE ORDER GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF OMAR RODRIGUEZ**
3. **[PROPOSED] ORDER RE: MOTION TO TAKE JUDICIAL NOTICE OF (1) PLAINTIFF AND APPELLANT ELFEGO RODRIGUEZ'S COMPLAINT FILED IN UNITED STATES DISTRICT COURT, CENTRAL DISTRICT, CASE NO. CV11-04858-ODW-PJWx ; (2) DECLARATION OF SERGIO BENT FILED IN THAT SAME LAWSUIT; (3) MAY 18, 2011 MINUTE ORDER GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF OMAR RODRIGUEZ**

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Michele Glikman

Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

ELFEGO RODRIGUEZ, et al.,
Plaintiffs and Appellants,

v.

BURBANK POLICE DEPARTMENT ET AL.,
Defendants and Respondents.

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The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
LASC Case No. BC 414602

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42729-00001

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Michele Glikman

Case No. B227414

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
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Defendants and Respondents.

Appeal from Superior Court of Los Angeles County, Department 37
The Honorable Joanne O'Donnell, Telephone: (213) 974-5649
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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On September 2, 2011, I served the foregoing document(s) described as

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ANDY GOUKASIAN
Printed Name

Signature

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ARNEL BARTOLOME
Printed Name

Signature